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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-954

EDWARD J. SHANAHAN,
Petitioner

v.

STATE OF MAINE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Judicial Court of Maine (Pet. A1-A16) affirming the conviction of the Petitioner of manslaughter is reported as State v. Shanahan, 404 A.2d 975 (Me. 1979).

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on August 9, 1979, and the court's mandate was issued on the same day. Petitioner filed on September 14, 1979, a "Motion for Reconsideration" (Pet. A17-A20), which was denied summarily by order of the Supreme Judicial Court dated September 24, 1979. (Pet. A21). Petitioner filed his Petition in this Court on December 19, 1979, more than ninety days after the entry of final judgment by the Supreme Judicial Court of Maine. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3). For the reasons set forth in Argument I of this Brief, the Petition should be dismissed because it has been filed out of time.

QUESTIONS PRESENTED

1. WHETHER A STATE COURT MAY TREAT AS A PROCEDURAL DEFAULT WHICH DISENTITLES A DEFENDANT TO A JUDICIAL DETERMINATION OF HIS MIRANDA-BASED OBJECTION THE DEFENDANT'S DELIBERATE ELECTION TO WITHDRAW HIS PRETRIAL MOTION TO SUPPRESS FOR THE PURPOSE OF "JUDGESHOPPING."

2. WHETHER THE ACTIONS OF THE MOTION JUSTICE CONSTITUTED "PER SE PREJUDICE" AND JUSTIFIED PETITIONER'S WITHDRAWAL OF HIS PRETRIAL, MIRANDA-BASED OBJECTION AND HIS ATTEMPT TO RAISE THE OBJECTION BEFORE A DIFFERENT JUSTICE.

3. WHETHER PETITIONER WAS ENTITLED TO A HEARING AS TO THE VOLUNTARINESS OF HIS EXTRAJUDICIAL INCULPATORY STATEMENTS NOTWITHSTANDING HIS FAILURE TO OBJECT AT TRIAL OR ON APPEAL TO THE ADMISSION OF THE STATEMENTS ON THE GROUND THAT THEY WERE INVOLUNTARY.

STATEMENT OF THE CASE

Respondent finds Petitioner's "Statement of the Case" (Pet. 3-6) unsatisfactory because it omits numerous matters relevant to a consideration of the

questions raised. However, rather than recite independently here the lengthy procedural history pertinent to the issues presented, for purposes of its "Brief in Opposition" Respondent relies on and incorporates herein the facts recited by the Supreme Judicial Court of Maine in its opinion denying Petitioner's direct appeal. (Pet. A2-A7).

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED BECAUSE IT WAS FILED OUT OF TIME.

Pursuant to Sup. Ct. R. 22(1), Petitioner was required to file his Petition in this Court within ninety days of the entry of judgment by the Supreme Judicial Court of Maine. The Maine court judgment having been entered on August 9, 1979, the petition for certiorari should have been filed on November 7, 1979. Peti-

tioner filed his Petition, however, on December 19, 1979, forty-two days after the termination of the ninety-day period.

Petitioner would contend that his Petition was timely filed because he had filed in the Maine Supreme Judicial Court, within the ninety-day period of Rule 22(1), a motion for reconsideration. Ordinarily, the filing of a motion for reconsideration or rehearing within the time prescribed by the state court will toll the running of the ninety-day period. See, e.g., United States v. Healy, 364 U.S. 75, 77-80 (1964). This general rule should be inapplicable here since no authority existed for the Petitioner's motion for reconsideration. In Maine there exists no statute or court rule authorizing rehearing or reconsideration by the State's highest court. Consequently, there exists no statute or court rule

prescribing a time limit for the filing of a motion for reconsideration or rehearing. Although such motions are occasionally filed the Maine Supreme Judicial Court has held repeatedly that it is without jurisdiction to reconsider its judgment after the issuance of its mandate, except in those limited instances "for the purpose of correction [of the mandate], where there has been some irregularity or error in its issuance, as where it was issued contrary to the rules of court, or where by reason of clerical mistake, it does not correctly express the judgment of the court... ." Ginn v. Penobscot Co., 342 A.2d 270, 275 (Me. 1975); accord, Hodgdon v. Fuller, 398 A.2d 798, 800 (Me. 1979); Rand v. B. G. Pride Realty, 360 A.2d 519, 521-22 (Me. 1976). In the instant case, Petitioner's motion was denied by the Maine court without hearing and without discussion of the merits.

Because the Maine court was without jurisdiction to reconsider its judgment on the grounds advanced by Petitioner, Petitioner's motion for reconsideration should not be deemed to toll the running of the ninety-day period.

Although the untimely filing of a petition for certiorari is not a jurisdictional defect, lack of timeliness should result in dismissal in this case because there exist no compelling reasons for waiver of the requirement. Petitioner's reliance on his motion for reconsideration to circumvent the time limitation cannot be justified in view of the absence of any authority in Maine for the filing or entertainment of such a motion and the jurisdictional bar to such motions (where, as here, the motion is filed after the issuance of the court's mandate) recognized by Ginn v. Penobscot Co., supra, and subsequent decisions.

II. THE DETERMINATION OF THE MAINE COURT THAT PETITIONER'S TACTICAL DECISION TO "JUDGESHOP" DISENTITLED HIM TO A HEARING ON HIS MIRANDA-BASED OBJECTION TO THE ADMISSION OF HIS INCULPATORY STATEMENTS IS NEITHER INCORRECT NOR IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Having filed pretrial motions to suppress his extrajudicial inculpatory statements on the ground that they were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), Petitioner, acting contrary to the advice of his attorney, personally demanded that the motions be withdrawn in order that they could be heard by a justice other than the justice before whom the motions were pending. The principal question presented by the Petition is the correctness of the determination of the Supreme Judicial Court of Maine that Petitioner's deliberate election to engage in "judgeshopping" disentitled Petitioner to a hearing on his Miranda-based motion before a different justice.

The many significant policies militating against the "judgeshopping" conduct engaged in by Petitioner underscore the correctness of the Maine rule. The practice of "judgeshopping" casts doubt on the integrity of the trial judiciary in the eyes of the public. It places the scheduling of judicial proceedings in the hands of the defendant rather than the judiciary. It needlessly delays the commencement of trial and may seriously disrupt the schedules of individual trial justices and the courts in which they sit. It results in severe hardship to the prosecution and its witnesses when, as in this case, the defendant elects to withdraw his motion at the time of the scheduled hearing merely because he anticipates better fortune before a different justice. The rule applied by the Maine court to prevent this practice of "judgeshopping," therefore, serves a legitimate state interest

while imposing no impediment to the reasonable presentation of Miranda-based claims in the trial courts. A contrary result would subject to chaos and ridicule the judicial administration of criminal defendants' pretrial Miranda claims.

Moreover, the decision of the Maine court is not in conflict with the decisions of this Court. This Court has recognized that a criminal defendant can waive judicial determination of an alleged violation of Miranda v. Arizona by his failure to comply with a state's "contemporaneous objection" rule. Wainwright v. Sykes, 433 U.S. 72 (1977). In the instant case the Maine court expressly declined to adopt a rule as stringent as the Florida rule, examined in Wainwright v. Sykes, requiring Miranda-based objections to be raised prior to trial. The Maine court held only that when a Miranda-based objection is raised

prior to trial, policies militating against "judgeshopping" preclude a defendant from withdrawing and later attempting to renew the objection solely and expressly because the defendant is dissatisfied with the justice who is assigned to hear the matter. Given the importance of the policies underlying the holding below and the untenable consequences of a contrary result, it is very unlikely that any conflict with the Maine court's determination would ever arise.

III. PETITIONER'S CLAIM THAT THE CONDUCT OF THE MOTION JUSTICE CONSTITUTED "PER SE PREJUDICE" ENTITLING PETITIONER TO "JUDGE-SHOP" IS NOT SUPPORTED BY THE FACTS.

In a cursory statement in his brief on direct appeal (quoted at Pet. 8), Petitioner claimed that the conduct of the motion justice in terminating prematurely the suppression hearing constituted "per se

prejudice" entitling Petitioner to withdraw his motions to suppress and to seek to have them heard by a different justice. The Maine Supreme Judicial Court implicitly rejected this claim by its determination that Petitioner's "judgeshopping" tactic constituted a waiver of his entitlement to a hearing (Pet. A9-A10) and by its recognition that the motion justice, "realizing that he may have erred, set aside his denial of the suppression motions and afforded defendant fair opportunity, still seasonably prior to trial, to complete the hearing as to his Miranda claims." (Pet. A8-A9).

Petitioner's claim that the action of the Motion Justice in prematurely terminating the suppression hearing without affording Petitioner an opportunity to present witnesses constituted per se prejudice is not supported by the facts. The state court

record suggests that at the time he terminated the suppression hearing the motion justice was unaware that Petitioner desired to present any witnesses. The Prosecuting Attorney stated for the record that "it's my understanding and I'm sure it's the Court's understanding without it being reflected in the record nor it being formally said that defendant wasn't -- defense was not going to offer any witnesses and I think probably your decision was in that light." (Vol. II (§1) at 53). When later it was brought to the attention of the motion justice that he may have prematurely terminated the suppression hearing, the justice set aside his denials of the motions to suppress, continued trial for two months and afforded Petitioner a full opportunity to present anew his motions to suppress - an opportunity rejected by Petitioner, who elected to withdraw his

motions and attempt to resurrect them before a different justice. In view of Petitioner's explicit acknowledgment in his state court brief that there existed no actual bias on the part of the motion justice (Petitioner's State Court Brief at 8), and in view of the absence of any indication that the justice became embroiled in any personal controversy with Petitioner or defense counsel, see Withrow v. Larkin, 421 U.S. 35, 47 & cases cited at n. 15 (1975), there is no support for the claim of per se prejudice.

IV. THE QUESTION AS TO THE VOLUNTARINESS OF PETITIONER'S STATEMENTS TO POLICE WAS NEVER PROPERLY RAISED IN THE STATE COURTS.

As the Supreme Judicial Court of Maine expressly found (Pet. A8, A10 n.7), Petitioner made no objection prior to trial or at trial to the admission of his statements on the ground that they were involuntary, nor did he raise such a claim in

his direct appeal. Petitioner's challenge to the admission of his statements at trial and on appeal was founded solely on his claim that they were obtained in violation of Miranda v. Arizona, supra. Moreover, Petitioner's attempt to raise the issue by way of his motion for reconsideration filed after the denial of his appeal comes too late, particularly in view of the inability of the Maine Court to entertain the post-appeal motion (see Argument I, ante). See, e.g., Herndon v. Georgia, 295 U.S. 441, 443 (1935). Contrary to Petitioner's suggestion (Pet. 10), the determination by the Maine Supreme Judicial Court that a hearing on the issue of voluntariness was not required absent some contemporaneous challenge to the voluntariness of the statements sought to be used against Petitioner does not conflict with the holdings of this Court. See Wainwright v. Sykes, 433 U.S. 72, 86 (1977).

V. THE PETITION DOES NOT PRESENT A QUESTION SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

The Maine Supreme Judicial Court held that because this Petitioner, acting contrary to the advice and admonitions of his attorney and although afforded a full and fair opportunity to present the claim, personally withdrew his Miranda claim for the express purpose of having a different justice consider the issue, lost his entitlement to a judicial determination of the claim. The holding of the Maine court did not involve the determination of a significant constitutional issue likely to have a substantial impact upon criminal defendants in Maine. The limited procedural rule adopted by the Maine court would apply only to those defendants who choose to raise a Miranda claim prior to trial and who then withdraw the Miranda claim "for the patently invalid reason of avoiding having [it] decided by a different Justice

more to defendant's liking."[1] (Pet. A10). The holding of the Supreme Judicial Court does not alter or conflict with any established procedural rule or constitutional principle; nor does it prevent, or erect an impediment to, the assertion of Miranda claims. Absent the judgeshopping evident in the instant case, the holding of the Maine court would not apply to any litigant other than this Petitioner.

In view of the limited scope of the Maine court's decision and in view of the fact that Petitioner's own trial testimony was sufficient by itself to support his conviction of the crime of manslaughter (Pet. A13, A15), the exercise of this Court's discretionary jurisdiction is not warranted.

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1. The Maine court also indicated that application of the limited rule it adopted would be left to the discretion of the second justice before whom the defendant attempts to reassert his claim. (Pet. A10).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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